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No. 207

IN THE

Supreme Court of the United States

October Term, 1961.

ARLENE COATS, a partnership consisting of Sidney Berkenfeld and Benjamin Prepon,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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Arlene Coats, a partnership consisting of Sidney Berkenfeld and Benjamin Prepon, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on January 12, 1962.

OPINION BELOW.

The opinion of the Court of Claims (App. p. 14) is reported at 297 F. 2d 546.

JURISDICTION.

The judgment of the Court of Claims was entered on January 12, 1962 (Tr. p. 58). A timely motion for rehearing was denied April 4, 1962 (Tr. p. 88). The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTIONS PRESENTED.

1. A price adjustment article in a supply contract provided that ". . . If . . . the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article entitled 'Disputes'," and the standard Disputes article of such contract provided for decision by the contracting officer of factual disputes and an appeal to the Secretary "whose decision shall be final and conclusive upon the parties." The Secretary's decision was received by petitioner on January 5, 1950. Under the Court's decisions in *United States v. Moorman*, 1950, 338 U. S. 457, decided January 9, 1950, and *United States v. Wunderlich*, 1951, 342 U. S. 98, decided November 26, 1951, the Secretary's decision on petitioner's claim was final and conclusive absent fraud. The petitioner does not aver that the Secretary's decision was fraudulent or so grossly erroneous as to imply bad faith but only that the Secretary's decision "was arbitrary and capricious and not supported by substantial evidence." The question presented is whether under the contract provisions petitioner could have brought suit on any other ground than that the Secretary's decision was fraudulent.

2. Whether the Act of May 11, 1954, 68 Stat. 81, 41 U. S. C. 321, which provided that the administrative decision ". . . shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." established a new standard for judicial review viz. "not supported by substantial evidence."

3. Whether the Court's decision in *United States v. Wunderlich*, supra, on November 26, 1951, did not apply to the Secretary's decision rendered in petitioner's case on

January 5, 1950, so that plaintiff could have brought suit at any time prior to the *Wunderlich* decision on the ground that the Secretary's determination "was arbitrary and capricious and not supported by substantial evidence."

4. Whether the Act of May 11, 1954, 68 Stat. 81, the Wunderlich Statute, did nothing more than restore the remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious or whether the Act of May 11, 1954, 68 Stat. 81, adopted the additional remedy of seeking review of the Army's decision on the ground that it was not supported by substantial evidence.

STATUTORY AND CONTRACT PROVISIONS INVOLVED.

1. The Act of May 11, 1954, 68 Stat. 81 (Wunderlich Statute), 41 U. S. C. 321, 322, provides:

> §321. Limitation on pleading contract-provisions relating to finality; standards of review
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such a contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The "Revision of Price" article in pertinent part, and the "Disputes" article of the contract provide (Tr. 1, 2):

"14. REVISION OF PRICE:

"(a) The prices fixed herein may be increased or decreased in accordance with this Article.

* * * * * * * * *

"(e) Disagreements.—If . . . the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Article entitled 'Disputes', and the prices so fixed shall remain in effect for the balance of the contract notwithstanding any other provision of this Article."

* * * * * * * * *

"ARTICLE 16. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall mail to the Contractor a written notification of his determination. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties. Pending decision of a dispute hereunder the

Contractor shall diligently proceed with the performance of this contract."

STATEMENT.

This action arose out of petitioner's claim to recover the difference between the unit price of $19.00 claimed for the 125,000 overcoats delivered and the unit price of $15.29 actually paid plaintiff for the manufacture of such 125,000 overcoats for the Army. The decision by the Court of Claims was rendered upon motions for summary judgment and there are no findings. The opinion of the Court of Claims does not recite the facts in the petitioner's case but in a companion case (*Cosmopolitan Manufacturing Co. v. The United States*, No. 168-60) which is not before the Court. The petition (Tr. pp. 1-4) discloses the following facts:

In June 1946 petitioner and respondent entered into a contract for the manufacture of 125,000 Army overcoats with removable liner and the initial price as adjusted by modification not in dispute was $19.00 each for total consideration of $2,375,000.

The contract provided for price revision, that if the respondent's contracting officer and petitioner failed to agree to revised prices, such disagreement should be deemed a question of fact to be disposed of in accordance with the article entitled Disputes, and the Disputes article provided that disputes concerning questions of fact should be decided by the contracting officer and for appeal to the Secretary of War whose decision should be final and conclusive upon the parties. After a dispute arose, the contracting officer rendered a finding of fact and decision under the Disputes article fixing the contract prices at $15.05 per unit and $1,881,250 as total contract price. Upon timely

appeal, the Secretary of the Army, Successor to the Secretary of War, fixed the unit price at $15.29 and total contract price at $1,911,250. That decision of the Secretary was received by the plaintiff on January 5, 1950, which was its effective date (see *Sachs v. United States*, 1945, 104 Ct. Cl. 372, 395). The present action filed April 11, 1960, claims $19.00 per unit for said 125,000 overcoats less the amount paid by the respondent at $15.29 per unit or difference of $463,750 on the ground that petitioner is entitled to recover the amounts due and paid under fixed price subcontracts of $15.00 per overcoat plus $1.30 per unit for bias binding, trimmings and findings, and $2.70 per unit for petitioner's overhead and profit on the ground that since there was no fraud, the decision of the Secretary was final and binding upon petitioner when received January 5, 1950, and not subject to judicial review; that petitioner had no right of action until the Act of May 11, 1954 supra (Wunderlich Statute), was enacted and thereunder judicial review was provided to the petitioner upon petitioner's allegation that the decision of the Secretary of the Army "was arbitrary and capricious and not supported by substantial evidence." The Court of Claims decided that the Act of May 11, 1954, "did nothing more than . . . restore [the] remedy . . . of seeking review of the Army's decision on the ground that it was arbitrary and capricious" (Tr. p. 56) and that petitioner, who received the Secretary's decision on January 5, 1950, "could have brought suit at any time prior to the *Wunderlich* decision on the ground that the Secretary's determination was arbitrary, capricious or so grossly erroneous as to imply bad faith" (Tr. p. 56). *Note*: petitioner only alleged in its petition that the Secretary's decision was "arbitrary and capricious and not supported by substantial evidence." There is no allegation or evidence that the Secretary's decision was "so grossly erroneous as to imply bad faith." The Court of Claims dismissed plain-

tiff's petition on the ground that it was barred by the statute of limitations.

REASONS FOR GRANTING THE WRIT.

1. Insofar as it rests upon the holding that the Act of May 11, 1954, 68 Stat. 81 (Wunderlich Statute), 41 U. S. C. 321 "did nothing more than . . . restore [the] remedy . . . of seeking review of the Army's decision on the ground that it was arbitrary and capricious" (App. p. 17), the decision of the Court of Claims is in square conflict with *Lowell O. West Lumber Sales v. United States*, 9 Cir. 1959, 270 F. 2d 12; *Wells & Wells, Inc. v. United States*, 8 Cir. 1959, 269 F. 2d 412; *Hoffman v. United States*, 10 Cir. 1960, 276 F. 2d 199; *United States v. A. J. McKinnon*, 9 Cir. 1961, 289 F. 2d 908; *United States v. Hamden Co-operative Creamery Co.*, 2 Cir. 1961, 297 F. 2d 130, 134; *United States National Bank of Portland v. United States*, D. Ore. 1959, 178 F. Supp. 910; *Mann Chemical Laboratories, Inc. v. United States*, D. Mass. 1958, 174 F. Supp. 563; *Union Painting Co. v. United States*, D. Alaska 1961, 194 F. Supp. 803.

The conflict arising between the decisions of the Court of Claims and the decisions of the Courts of Appeals arises from the view taken of the phrase "not supported by substantial evidence" in the Act of May 11, 1954, supra, the Wunderlich Statute. The Court of Claims' viewpoint, as precisely illustrated by the decision below (App. p. 17):

> "Although the *Wunderlich* decision took away plaintiff's remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious, this remedy was restored by the Act of May 11, 1954 (68 Stat. 81). That Act did nothing more than this, that is,

to restore this remedy. *Volentine and Littleton, Contractors v. United States*, supra."

inverprets the Act of May 11, 1954, supra (Wunderlich Statute) to permit a complete new trial before the Court, with introduction of new evidence, in contract cases appealed from administrative Boards. The Courts of Appeals, however, limit review to solely a review of the administrative record and not a trial *de novo*: *Wells and Wells, Inc. v. United States, supra*, 269 F. 2d at page 415; *Lowell O. West Lumber Sales v. United States*, supra, 270 F. 2d at page 19; *United States v. A. J. McKinnon*, supra, 289 F. 2d at page 909.

This conflict arises because the Court of Claims views "not supported by substantial evidence" in the Act of May 11, 1954, supra (Wunderlich Statute) as adding nothing to the review granted by the Court of Claims before *United States v. Wunderlich*, supra, was decided November 26, 1951. The Courts of Appeals and the District Courts take the view that the phrase "not supported by substantial evidence" in the Act of May 11, 1954 supra (Wunderlich Statute) requires that review by the Court shall consist solely of a review of the administrative record and not a trial *de novo*.

The decision below pinpoints this issue squarely.

The decision below negates "not supported by substantial evidence" in the Act of May 11, 1954 supra (Wunderlich Statute) and states that the Wunderlich Statute did nothing more than restore the pre-*Wunderlich* decision remedy.

The Court below said (App. p. 16):

> "It is clear that Congress did not intend to grant any new right of action by the Act of May 11, 1954. In *Volentine and Littleton, Contractors v. United States, supra*, we held it merely intended to restore the *status quo ante* the *Wunderlich* decision."

The legislative history confirms the view of the Courts of Appeals that "substantial evidence" is a new judicial remedy under the Wunderlich Statute. House Report No. 1380, Committee on the Judiciary, 83d Congress, 2d Sess. (Congressional Record, page 3674):

> "A principal change which the amendment effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official vested with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in Ripley v. United States, 223 U. S. 695, 32 S. Ct. 352. The standards of arbitrariness and capriciousness in relation to the review of administrative action were also prescribed in the Administrative Procedures Act (act of June 11, 1946, ch. 324, sec. 10, 60 Stat. 243; 5 U. S. C. 1009). There is a wealth of judicial precedent behind these standards of review and it is the committee's belief that they should not be abandoned.
>
> "The proposed amendment also adopts the additional standard that the administrative decision must be supported by substantial evidence. The requirement that administrative action be supported by substantial evidence is found in the Administrative Procedures Act, supra. As understood by the committee and as interpreted by the Supreme Court in Consolidated Edison Company of New York v. National Labor Relations Board, 305 U. S. 197, 229, 59 S. Ct. 206, 'substantial evidence' means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'

"The inclusion of the standard 'not' supported by substantial evidence' should also correct another condition arising out of the lack of uniformity between the various departments and agencies concerned in the appellate hearing procedures under the disputes clause. It has been brought to light in public hearings that it is the exception rather than the rule that contractors in the presentation of their disputes are afforded an opportunity to become acquainted with the evidence in support of the Government's position. It is believed that if the standard of substantial evidence is adopted this condition will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions. It would not be possible to justify the retention of the finality clauses in Government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal."

This conflict between the decisions of the Courts of Appeals and the District Courts on the one hand and the Court of Claims on the other hand is acknowledged by the Courts: See *United States v. Hamden Co-operative Creamery Co.*, supra, 297 F. 2d at page 134; and see *H. L. Yoh Co. v. United States* (Ct. Cl.), 1961, 288 F. 2d 493, 496.

It is submitted that this case squarely presents the conflict between the decisions of the Court of Claims and the decisions of the Courts of Appeals and the District Courts. The confusion upon the question and the conflict of the decisions should be cleared by a determination of this Court.

2. The construction of the Act of May 11, 1954, supra (Wunderlich Statute) has not as yet been before the Court.

The meaning of the statutory phrase "not supported by substantial evidence" is of utmost importance and clarification should be accomplished by this Court's granting review in this case. The case involves a decision on an important question of Federal law not yet decided by this Court.

3. Insofar as it rests upon the holding that plaintiff "could have brought suit at any time prior to the *Wunderlich* decision" (App. p. 16) the decision of the Court of Claims is in square conflict with *United States v. Wunderlich*, 1951, 342 U. S. 98; *United States v. Moorman*, 1950, 338 U. S. 457; and *United States v. McShain*, 1939, 308 U. S. 512, 520. Petitioner herein did not allege fraud and did not allege that the Secretary's determination was so grossly erroneous as to imply bad faith. Petitioner's petition only alleged that the decision of the Secretary of the Army "was arbitrary and capricious and not supported by substantial evidence." The Court of Claims has adhered to the rule which it announced prior to the Court's decision in *United States v. McShain*, supra, in 1939, prior to the decision in *United States v. Moorman*, supra, in 1950, and prior to the decision rendered by the Court in *United States v. Wunderlich*, supra, in 1951. The Court of Claims is consistent. It ruled in *McShain v. United States*, 1939, 88 Ct. Cl. 284, that the plaintiff there had a contractual right of action. This Court reversed: *United States v. McShain*, supra. It ruled in *Moorman v. United States*, 1949, 113 Ct. Cl. 159, that the plaintiff there had a contractual right of action. This Court reversed: *United States v. Moorman*, supra. It ruled in *Wunderlich v. United States*, 1950, 117 Ct. Cl. 92, that the plaintiff there had a contractual right of action. This Court reversed: *United States v. Wunderlich*, supra. In ruling that the plaintiff below had a contractual right of action the decision of the Court below is in square conflict with this Court's

decisions in *United States v. McShain*, *United States v. Moorman, and United States v. Wunderlich*, supra. It is submitted that this adds a ready reason for review and reversal by this Court.

4. Insofar as it rests upon the holding that the decision of the Court in *United States v. Wunderlich*, supra, rendered November 26, 1951, has no application to an administrative decision effective January 5, 1950, the decision of the Court of Claims is in square conflict with the Separation of Powers doctrine. The decision below rests upon a confusion between a judicial and a legislative act, in ascribing to a judicial act the limitation that it prescribes what the law shall be in future cases arising under it. See *Sinking Fund Cases*, 1878, 99 U. S. 700, 761; *Prentis v. Atlantic Coast Line*, 1908, 211 U. S. 210, 226; *Kihlbourn v. Thompson*, 1880, 103 U. S. 168. It is submitted that this is an additional ground for review.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWIN J. McDERMOTT,
Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF CLAIMS.

(Decided January 12, 1962.)

No. 168-60.

COSMOPOLITAN MANUFACTURING CO. v. THE UNITED STATES.

No. 123-60.

ARLENE COATS, A PARTNERSHIP CONSISTING OF SIDNEY BERKENFELD AND BENJAMIN PREPON, v. THE UNITED STATES.

EDWIN J. McDERMOTT for plaintiffs.

MARY J. TURNER, with whom was ASSISTANT ATTORNEY GENERAL WILLIAM H. ORRICK, JR., for defendant.

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT.

Per Curiam: These are two separate suits to recover the difference between the original contract price and the price actually paid plaintiffs by defendant for the manufacture of overcoats for the Army. They are before the court on defendant's motions for summary judgment grounded on the allegation that the suits are barred by the statute of limitations. Plaintiffs have also filed motions for summary judgment.[1]

Since all the issues presented in the case of *Arlene Coats v. United States*, No. 123-60, are identically presented in the case of *Cosmopolitan Manufacturing Co. v. United States*, No. 168-60, and since a decision in the latter case is dispositive of both cases, we confine our opinion to a discussion of the facts and law involved in No. 168-60.

Plaintiff's petition alleges that in 1946, it entered into a contract with defendant for the manufacture of overcoats for the Army at a unit price of $17.50. Under the terms of the contract a revised price was to be negotiated after 40 percent of the overcoats had been delivered. If the parties could not agree upon a revised price, after the prescribed percentage of overcoats had been delivered, the contracting officer was authorized to determine the price to be paid. The parties could not agree; whereupon the contracting officer determined that a unit price of $15.00 was fair and reasonable.

Plaintiff appealed from this decision to the Army Board

[1] Plaintiffs subsequently moved for leave to withdraw their motions for summary judgment. We denied their motions for leave to withdraw on December 15, 1961.

of Contract Appeals, which, on June 23, 1948, found $16.56 to be the proper unit price. The decision of the board was approved by the Secretary of the Army on June 25, 1948.

Plaintiff has been paid for 34,000 of the 35,000 overcoats delivered under the contract at a price of $16.56 per unit. Plaintiff's subcontractor manufactured the remaining 1,000 overcoats for which the price of $15.40 per unit, the price agreed to by the subcontractor, was paid. In this suit, plaintiff seeks to recover the difference between the price paid it for the 35,000 overcoats and the original contract price of $17.50 per unit.

It is clear that plaintiff cannot recover because its claim is barred by the statute of limitations.

Plaintiff grounds its claim on the alleged arbitrary and capricious action of the Army Board of Contract Appeals, and its approval by the Secretary of the Army. It follows that plaintiff's cause of action, if any, accrued at the time the appeals board acted, all events having occurred which were necessary to fix the liability of defendant and entitle plaintiffs to bring suit. *Empire Institute of Tailoring, Inc. v. United States*, 142 Ct. Cl. 165; *Levine v. United States*, 133 Ct. Cl. 774; *Sese v. United States*, 125 Ct. Cl. 526; *Gray v. United States*, 124 Ct. Cl. 313; *Reliance Motors, Inc. v. United States*, 112 Ct. Cl. 324.

But plaintiff says that it had no right to bring suit at that time because of the decision of the Supreme Court in *United States v. Wunderlich*, 342 U. S. 98, holding that the courts did not have the power to review the decision of the head of a department unless it was alleged and shown that his decision was fraudulent, and plaintiff says it expressly exonerated defendant of fraud. However, that decision was rendered on November 26, 1951, more than three years after plaintiff's cause of action accrued on June 25, 1948. There is no question but that plaintiff could have brought suit at any time prior to the *Wunderlich* decision on the ground that

the secretary's determination was arbitrary, capricious, or so grossly erroneous as to imply bad faith. *Silas Mason Co. v. United States*, 90 Ct. Cl. 266. Cf. *Palace Corp. v. United States*, 124 Ct. Cl. 545, *cert.* denied 346 U. S. 815; *Volentine and Littleton, Contractors v. United States*, 136 Ct. Cl. 638.

Although the *Wunderlich* decision took away plaintiff's remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious, this remedy was restored by the Act of May 11, 1954 (68 Stat. 81). That Act did nothing more than this, that is, to restore this remedy. *Volentine and Littleton, Contractors v. United States, supra.* The fact that, in the interim between the *Wunderlich* decision on November 26, 1951, and the date of its restoration on May 11, 1954, plaintiff could not have pursued the remedy it now seeks to pursue, affords it no relief from the running of the statute of limitations, because plaintiff's cause of action first accrued more than three years prior to the *Wunderlich* decision. *De Arnaud v. United States*, 151 U. S. 483; *Whitney's Admn'x v. United States*, 18 Ct. Cl. 19; *Marcos v. United States*, 122 Ct. Cl. 641. Suit still had to be brought within six years from the date plaintiff's cause of action first accrued, which was no later than June 25, 1948.

Title 28 U. S. C. §2501, as amended by the Act of September 3, 1954, 68 Stat. 1246, provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.
>
> * * * * * * * * * *
>
> A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.
>
> * * * * * * * * * *

In *Soriano v. United States*, 352 U. S. 270, the Supreme Court held that Congress in prescribing this limitation period meant just that period and no more and that even the existence of a state of war between this country and Japan, which prevented plaintiff from filing his claim, did not toll the running of the statute. Since plaintiff did not bring its suit until April 11, 1960, almost twelve years after its claim first accrued, it is clearly barred.

It is clear that Congress did not intend to grant any new right of action by the Act of May 11, 1954. In *Volentine and Littleton, Contractors v. United States, supra*, we held it merely intended to restore the *status quo ante* the *Wunderlich* decision. This purpose could not have been expressed more clearly than in the committee report accompanying the "Wunderlich" bill. H. R. 1380, 83d Cong., 2d Sess., states in pertinent part:

> The purpose of the proposed legislation, as amended, is to overcome the effect of the Supreme Court decision in the case of *United States v. Wunderlich*, (342 U. S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers.
>
> A principal change which the amendment [which became the Wunderlich Act] effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official vested with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in *Ripley v. United States*, (223 U. S. 695). * * *

There is a wealth of judicial precedent behind these standards of review and it is the committee's belief that they should not be abandoned.

* * * * * * * * *

The committee foresees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to its enactment, with the exception of the standards of review therein prescribed. Under the terms of the standard disputes clause the decision of the contracting officer is final unless the contractor appeals within 30 days * * * [Emphasis supplied].

The statute of limitations regarding claims against the United States is jurisdictional and prevents the consideration of a claim which is more than 6 years old. Claims less than 6 years old, and not heretofore filed in the courts *may, if filed, receive the protection of the proposed legislation.* In this way the basic requirement of the contract that an appeal be noted to the head of the department within 30 days, as well as the protection which the Government receives under the statute of limitations applicable to these matters, have been retained. [Emphasis supplied.]

Plaintiff seeks to amend its petition to assert as an alternative contention that the decision of the Board of Contract Appeals and the Secretary of the Army did not become final for some 10 or 11 years after the decision was made, because there was pending before the Board a motion for reconsideration. Thus, plaintiff says that the statute of limitations was tolled during this period.

The alleged motion consists of a letter from a successor contracting officer to the board calling the attention of the latter to the fact that 1,000 of the 35,000 units delivered

under the contract were manufactured by plaintiff's subcontractor, which had agreed to accept a price per unit lower than that found by the Secretary. The board was advised that an amount representing the difference in price on the 1,000 overcoats was being withheld and it was, therefore, "requested that the decision of the Secretary of the Army be reconsidered." This letter was never acted upon; the board did not reopen the case; it did not disturb its former decision. The making of a request for reconsideration does not deprive the former decision of finality; it is the granting of the request that does so. This request was not granted, so far as the record shows.

Defendant's motions for summary judgment are granted; plaintiffs' like motions are denied; plaintiff's motion to amend its petition in case No. 168-60 is denied, and plaintiffs' petitions in cases Nos. 168-60 and 123-60 will be dismissed.

It is so ordered.